IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KIRK LOREN RISHOR, Appellant.	))))))))))	No. 54954-5-I **DIVISION ONE** UNPUBLISHED OPINION FILED: August 14, 2006

APPELWICK, C.J. — A jury convicted Kirk Rishor of one count of second-degree assault with a firearm enhancement and one count of first-degree unlawful possession of a firearm. Rishor argues that the trial court erred in instructing the jury on the lesser-degree offense of second-degree assault. Because the evidence raised an inference that Rishor committed second-degree assault to the exclusion of first-degree assault, it was not error to give the lesser-degree offense instruction. Rishor also argues that a missing nexus requirement on the firearm enhancement instruction denied him due process. This requirement does not apply in cases of actual, as opposed to constructive,

possession. Moreover, Rishor's admissions established nexus beyond a reasonable doubt. Finally, Rishor argues that erroneous self-defense instructions denied him a fair trial. We agree that the instructions erroneously elevated the standard justifying the use of force in self-defense and thereby relieved the prosecution of its burden to prove the absence of self-defense. This error is not harmless beyond a reasonable doubt. We reverse Rishor's conviction on second-degree assault and remand for a new trial on count I.

FACTS

Kirk Rishor represented himself at his trial, assisted by standby counsel Lisa Waldvogel. Rishor did not testify in his own defense. Deann Bonner testified that on the morning of February 19, 2004, Rishor drove by her house several times with a gun and threatened her.[1] That evening, Rishor and James Kraft drove to Bonner's house. It is undisputed that Rishor and several other men had an argument on the porch and in the front yard, and that Rishor shot one of those men, Jarrod Fife, in the shoulder. The gunshot wound required surgery. The treating physician testified that Fife had been lucky; had the path of the bullet been slightly altered, Fife's injuries would have been life-threatening. Bullets found in Rishor's room were the same type of bullet made by the same manufacturer as the remaining bullets found in the weapon. The evidence was not conclusive that the bullet recovered from Fife's shoulder was fired from the recovered weapon.

[1] Two gun-pointing incidents formed the basis of the assault charges in counts II and III, on which the jury acquitted Rishor. Those charges are not at issue on appeal.

Several witnesses testified to the shooting. Theresa Morris, who was at

Bonner's house that day, testified that she heard a heated argument. There were several people outside on the porch. Morris went outside and saw "a lot of testosterone. Like they were going to get into a fight." Rishor was at the bottom of the stairs. Morris testified that Rishor was very agitated and upset because of the "four or five guys" arguing on the porch. Morris tried to soothe the argument and get Rishor to leave. Rishor started walking with Morris toward a car. The rest of the people remained on the porch.

As they walked to the car, Rishor became agitated and started yelling at Morris, close to her face. Morris and Rishor reached the car. Morris then saw Rishor next to the car with the car door open. Fife was in the street, about one and a half car lengths away from Rishor. Morris saw Rishor hold a gun in a two-handed stance and aim it at Fife. Morris testified that Rishor did not aim the gun at her. Morris testified that Fife had no weapons and did not strike Rishor. Morris testified that she did not hear Fife say anything to Rishor, because she had tunnel vision and focused only on herself and Rishor. She knew the gun was fired because she saw flames come out of the end of it, and then saw Fife holding his shoulder. Morris testified that "it just happened real quickly."

Bonner testified that she heard some commotion and went to a second floor window to see what was going on. She heard Morris talking to Rishor in the front yard. She saw Rishor get angry and approach Morris. She saw five or six other people in the yard, about three to five feet away from Rishor and Morris. Bonner stated that while several people were walking Rishor out to his

car and

encircled him to make him leave, nobody was violent or laid a hand on Rishor. Fife was closest to Rishor and Morris. Fife told Rishor to back off and shoved Rishor away from Morris. Bonner saw Rishor stumble back and then "immediately pull[] a gun out" from his waistband and point it at Morris. Fife managed to get in between Morris and Rishor. Bonner testified that Fife did not have a weapon, and the other people were still in the yard and had not moved. Rishor held the weapon with both hands and fired it. The bullet struck Fife. Bonner testified that it "all happened very quickly."

Chad Weden worked at the Whatcom Security offices across from Bonner's house. Weden was reporting to work that evening when he noticed a group of about six to 10 people gathered near the front porch of Bonner's house. Two men were standing out in front of the house and an individual was behind them about 15 feet away. Weden did not remember seeing a woman standing with the men. As Weden drove by, he glanced up and saw one of the men holding up a dark object in his right hand that looked like it could have been a gun. Weden did not see the other man with any weapons. Weden testified that the shooter pointed the gun directly at the other man and shot "[i]nstantly as he drew his arm up." Weden then saw the shooter and another man get into a car and drive off.

A ballistics expert testified that the weapon Rishor used required about five pounds of pressure to fire, which is within normal range and not a "hair trigger type of weapon." Detective Michael Johnston interviewed Rishor shortly

after the incident and testified as to Rishor's statements. Rishor admitted pulling the trigger in the shooting. Rishor told Johnston he heard that Bonner was telling people he was a child molester and that he was waving a gun around. Rishor said he went over to the house, without a gun, to straighten out the misunderstanding and clarify that he was not a child molester. Bonner's husband was at the house, as were Fife and several other people. On examination by the State, Johnston testified:

> A. He said that he had gone into conversation with Deann Bonner, he pushed her, and Scott Bonner was there and a guy named Fife, he described him as a big dude, punched him and about seven guys jumped him and started mauling him.
>
> . . .
>
> Q. And how did he describe the circumstances?
>
> A. . . . Mr. Rishor said that this kid grabs him and four dudes are mauling me and he shot the fucking pistol, shot the fucking pistol, he said then him and Keith, who we later figured out is James Kraft, and jumped in the vehicle and he wiped the gun down and he was driving and threw the gun out the passenger window.
>
> . . .
>
> Q. Did he say anything about what he should have done or could have done?
>
> A. He was really animated, really worked up. He said that he should have shot [Fife] in the head and killed all the rest of those mother-fuckers, and he said that Fife screamed like a 10-year-old girl and kill the mother-fucker, and he said he had been shot by a Mexican before while pulling up his pant leg.

Johnston saw that Rishor had a scab on his cheek. Rishor indicated that was where he was punched. Johnston did not think the injury was significant and testified that it "could have been from a punch or it could have been from

something else."

Rishor's brief contains factual allegations that Rishor made in closing argument, but which are not supported by trial testimony. Statements made in closing argument are not evidence. For example, Rishor stated in closing that Fife pulled a pistol on him, and that Rishor took Fife's pistol and shot Fife with it. Despite both parties' apparent adoption of this statement as Rishor's testimony, no testimony supports these facts directly. Johnston's testimony and other evidence presented by Rishor support Rishor's assertion that he did not have a gun when he went to Bonner's house, took a gun from someone, and shot Fife.[2] The testimony does not support an inference that (1) Fife pulled a pistol on Rishor or (2) that Rishor took the pistol from Fife. We disregard other references by the parties to Rishor's closing argument to the extent they attempt to substitute as testimony rather than argument.

Rishor was charged with one count of first-degree assault against Jarrod Fife (count I), two counts of second-degree assault against Deann Bonner (counts II and III), and one count of first-degree unlawful possession of a firearm (count IV). The jury acquitted Rishor on counts II and III and convicted him on count IV. On count I, it did not reach a verdict on first-degree assault but instead convicted Rishor of second-degree assault. The jury also answered "yes" on a firearm enhancement special verdict on count I.

[2] Rishor presented the testimony of several witnesses who said that they did not see him with a weapon that day, prior to the shooting. Rishor's daughter testified that she had never seen him with a gun, although she had seen one in his room that someone else hid there. This evidence supports an inference that on the day of the shooting, Rishor took the weapon from someone, although it does not specifically support the inference that he took it from Fife.

Rishor argues that the trial court should not have given the jury a lesser-degree offense instruction on count I because the evidence did not support the finding that Rishor committed only the lesser-degree offense and not the greater offense. Rishor also argues that the self-defense instruction given was erroneous and deprived him of a fair trial. Rishor finally argues that the lack of a nexus requirement in the firearm enhancement instruction denied him due process.

ANALYSIS

I. The Lesser-Degree Offense Instruction Was Appropriate

A challenged jury instruction is reviewed de novo and evaluated in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions must be supported by substantial evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Under RCW 10.61.003, a defendant can be found guilty of a crime that is an inferior degree of the crime charged. An

> instruction on an inferior degree offense is properly administered when: (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

Fernandez-Medina, 141 Wn.2d at 454 (internal quotations and citations omitted). The test requires that the evidence raise an inference that only the inferior degree offense was committed to the exclusion of the charged offense.

Fernandez-Medina, 141 Wn.2d at 461.

In determining whether the evidence was sufficient to support giving an instruction, we view the supporting evidence in the light most favorable to the party that requested the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. It is not sufficient that the jury may disbelieve the evidence pointing to guilt on the greater offense; there must be evidence to affirmatively establish guilt on the lesser offense. Fernandez-Medina, 141 Wn.2d at 456

(citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)). In Fowler, where the defendant requested the lesser-included offense instruction, the court held that the instruction must be affirmatively supported by evidence establishing the defendant's theory.[3] Fowler, 114 Wn.2d at 67. It is error to give an instruction not supported by the evidence. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citation omitted).

Rishor's jury was given to-convict instructions for both first-degree and second-degree assault against Fife. The to-convict instruction on first-degree assault provided:

> To convict the defendant of the crime of Assault in the First Degree, Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 19th day of February 2004, the defendant intentionally assaulted Jarrod Fife;
>
> (2) That the assault was committed with a firearm;
>
> (3) That the defendant acted with intent to inflict great bodily harm; and
>
> (4) That the acts occurred in the State of Washington.

(emphasis added). The to-convict instruction on second-degree assault provided:

> To convict the defendant of the lesser included crime of assault in

[3] The Fernandez-Medina court distinguished between lesser-included offenses and lesser-degree offenses. Fernandez-Medina, 141 Wn.2d at 454. The difference between the analyses is in the legal component of the relevant tests. Fernandez-Medina, 141 Wn.2d at 455. Here, as in Fernandez-Medina, only the factual component of the test is at issue. Fernandez-Medina, 141 Wn.2d at 455. The reasoning of cases in the lesser-included offense context can be applied in cases of lesser-degree offenses as to the factual component of the test. See Fernandez-Medina, 141 Wn.2d at 455-56 (holding that the failure to note the distinction between these two lesser offense contexts is not significant where the legal component of the test is not at issue).

> the second degree, Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 19th day of February 2004, the defendant:
>
> (a) intentionally assaulted Jarrod Fife and thereby recklessly inflicted substantial bodily harm; or
>
> (b) intentionally assaulted Jarrod Fife with a deadly weapon;
>
> and
>
> (2) That the acts occurred in the State of Washington.

(emphasis added). The jury was also instructed that

> [a] person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he intentionally assaults another with a firearm.
>
> A person commits the crime of assault in the second degree when under circumstances not amounting to assault in the first degree he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

The relevant difference here between first- and second-degree assault is whether Rishor shot Fife with the specific intent to inflict great bodily harm. The State contends that Rishor "strongly contested" the State's argument at trial that he intended to inflict great bodily harm. However, the State points only to Rishor's cross-examination of Johnston. Contrary to the State's characterization, this cross-examination focused on Johnston's inconsistent description of how long he and Rishor spoke during a particular interview.[4]

[4] Specifically, Johnston testified in the CrR 3.5 hearing that during an interview, Rishor talked "for 58 straight minutes" after he turned off the tape recorder. However, the tape was turned off at 1846 and turned on at 1904, which is 18 minutes, not 58 minutes. Johnston acknowledged that he made a mistake as to the length of time Rishor talked with the recorder off. At trial, Rishor cross-examined Johnston about the earlier CrR 3.5 hearing testimony. Rishor asked, "We talked about a time line and you stated under oath that I rambled on for 52 [sic] minutes; is

Rishor did not contest his intent to inflict great bodily harm.

Nevertheless, it was not error for the trial court to give the lesser-degree offense instruction. Taking the evidence in the light most favorable to the State as the party requesting the instruction, the jury could have found that Rishor recklessly inflicted substantial bodily harm and that he did not act with intent to inflict great bodily harm.[5] Based on the physician's testimony, Rishor did inflict substantial bodily harm on Fife. Other witness testimony supports a finding that Rishor raised his weapon and fired it intentionally, but was acting quickly to protect himself rather than slowly and deliberately, with intent to inflict great bodily harm on Fife. Morris and Bonner both testified that the incident happened very quickly. Weden testified that the shooter shot the weapon instantly after raising it. Therefore, the evidence did not preclude a finding that Rishor did not intend great bodily harm.

Because Rishor did not take the stand to testify, any testimonial statements he made in closing argument were not supported by the evidence and cannot be considered as evidence of his intent. No one testified to

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that right?" Johnston explained that he had calculated the time wrong because he simply subtracted 1846 from 1904 (not using a 60-minute clock), and therefore got the number wrong. Rishor's statement in closing on which the State relies is:

> Detective Johnston, I can't even say anything about him. He is a police officer. He is not supposed to mess up the misinformation. He is supposed to tell the truth. Plain and simple. That's what he is supposed to do. He didn't do that. He got caught. He got discredited on his own time line.

Rishor's closing argument addressed the mistake in Johnston's calculation of time.

[5] Rishor cites to State v. Shelton, 71 Wn.2d 838, 839, 431 P.2d 201 (1967), for the proposition that a shot to a victim's shoulder at close range during a disagreement indicated an intent to kill. While the jury can gather evidence of intent from all the circumstances of the case and evidence of a shot at close range toward the shoulder and neck is "ample to permit the jury to conclude that the assault was made with an intent to kill," Shelton, 71 Wn.2d at 839, the jury is not required to conclude that there was such an intent.

overhearing Rishor making any statement of his intent at the time of the shooting. The only testimony admitted at trial on Rishor's specific intent came from Johnston's description of Rishor's statements. However, Johnston's testimony reflects Rishor's after-the-fact statement of what he "should have" done, not what he actually intended to do at the time he shot the pistol. The evidence raised an inference that only the inferior degree offense was committed, to the exclusion of the charged offense. Thus, the trial court did not err in giving the lesser-degree offense instruction. See Fernandez-Medina, 141 Wn.2d at 455-56, 461.

II. Rishor Is Entitled to a New Trial Because the Erroneous Self-Defense Instructions Were Not Harmless Beyond a Reasonable Doubt

The State must prove every element of the crime charged beyond a reasonable doubt. Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). It is constitutional error to relieve the State of its burden of proving the absence of self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Thus, this error can be raised for the first time on appeal. See State v. Redwine, 72 Wn. App. 625, 625, 865 P.2d 552 (1994).

The jury was instructed on the defense of self-defense based on WPIC 17.02 (Instruction 16):

> It is a defense to the charge of Assault in the First Degree, Count One, or Assault in the Second Degree, as a Lesser Included Offense, that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The jury was also instructed based on WPIC 17.04 (Instruction 18):

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

The jury was also given a definition of great bodily harm based on WPIC 2.04, which accompanies a charge of assault in the first degree (Instruction 8):

> Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

Rishor argues that Instruction 18's use of the phrase "great bodily harm" rather than "injury" misstated the law and denied Rishor a fair trial on the assault charge, entitling him to a new trial. The State argues that there is no likelihood of prejudice and that the jury instructions accurately set forth the law of self-defense and permitted Rishor to argue his theory of the case.

This court has considered the same problematic jury instructions in State v. Rodriguez, 121 Wn. App. 180, 180, 87 P.3d 1201 (2004). In Rodriguez, Christopher Van Dinter confronted Refujio Rodriguez about noise that Rodriguez

was making. After a series of confrontations, Rodriguez and Van Dinter were talking near an apartment building. Van Dinter shoved Rodriguez, who stumbled. Rodriguez pulled out a knife and stabbed Van Dinter in the ensuing struggle. Rodriguez testified that he armed himself with a knife because he was afraid of Van Dinter, and that he took it out to try to keep Van Dinter at bay. Rodriguez told the jury he did not stab Van Dinter deliberately. Rodriguez, 121 Wn. App. at 182-83.

Rodriguez was charged with one count of first-degree assault while armed with a deadly weapon. Rodriguez, 121 Wn. App. at 183. The trial court instructed Rodriguez's jury with substantially the same instructions as were given to Rishor's jury in Instruction 18 and Instruction 8. The Rodriguez court summarized the problem with the instructions:

> Like the instructions that the court found objectionable in Walden, the instructions here "[b]y defining [great bodily injury] to exclude ordinary batteries, a reasonable juror could read [the instruction] to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, i.e., whether the defendant reasonably believed the battery at issue would result in great personal injury."

Rodriguez, 121 Wn. App. at 186 (quoting State v. Walden, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997)) (alterations in original). The Rodriguez court held that together with the definition of great bodily harm as part of the court's instructions on first-degree assault, "the jury was required to find that [the defendant] was scared of death or at least permanent injury. And that is not the test." Rodriguez, 121 Wn. App. at 187.

The State's contention that Rishor was not prejudiced because he was not arguing any mistaken appearance of threat is not persuasive. The problem with these instructions identified in Walden, Rodriguez, and in State v. Freeburg, 105 Wn. App. 492, 504-07, 20 P.3d 984 (2001), does not turn on whether the defendant argued mistaken fear of injury. Rather, the problem is created by the elevation of the standard allowing use of force in self-defense. As the court explained in Walden, "[d]eadly force may be used only in self-defense if the defendant reasonably believes he or she is threatened with death or 'great personal injury.'" Walden, 131 Wn.2d at 474. Use of the phrase "great personal injury" would prevent the erroneous elevation of the self-defense standard in cases where the phrase "great bodily harm" is defined for the jury as in Instruction 8.

As in Walden, Rodriguez, Freeburg, and State v. Corn, 95 Wn. App. 41, 975 P.2d 520 (1999), the use of Instruction 18 together with Instruction 8 was error. Although Fife was lucky and the bullet wound did not kill him, that result does not distinguish the reasoning of these cases. And in Rodriguez, as here, the charge was assault, not homicide. Because the jury instructions erroneously elevated the standard justifying the use of force in self-defense, they relieved the prosecution of its burden to prove the absence of self-defense.

The next question is to determine whether this error is harmless. "[A] jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis unless the error is structural and

affects the framework under which the trial proceeds." State v. Eaker, 113 Wn. App. 111, 120, 53 P.3d 37 (2002) (citing State v. Jennings, 111 Wn. App. 54, 62-63, 44 P.3d 1 (2002)). An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. Eaker, 113 Wn. App. at 120 (citations omitted). It is the State's burden to prove the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Eaker, 113 Wn. App. at 199. "'Applied to an element omitted from, or misstated in, a jury instruction, the error was harmless if that element is supported by uncontroverted evidence.'" Eaker, 113 Wn. App. at 120 (quoting Jennings, 111 Wn. App. at 64). The error here was not structural[6] and is therefore subject to harmless error analysis.

The State relies heavily on Freeburg to argue that the instructional error was harmless. In Freeburg, the defendant and the victim were in the midst of an on-going struggle and were wrestling with each other when the gun was fired. Freeburg, 105 Wn. App. at 495-96. The Freeburg court held that although the instructions (similar to those given in this case) were in error,

> there is no likelihood whatsoever that [the] use of the great bodily harm language affected the outcome here. [The defendant]'s theory at trial was that he was faced with a threat of gunshot at close range, which easily and obviously satisfies both definitions [of great bodily harm and great personal injury]. Had the jury believed him, it would doubtless have believed he faced a threat of great bodily harm.

[6] See Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991) (listing examples of structural errors such as the absence of counsel for a criminal defendant, a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, the right to public trial, involuntary statements or confessions of the defendant).

Freeburg, 105 Wn. App. at 505 (emphasis added). The facts of this case are not similar to those in Freeburg. The two factual scenarios presented to the jury about the gun in this case were the State's scenario (that Rishor brought a weapon with him and shot an unarmed Fife) and Rishor's scenario (that Rishor arrived unarmed and took the weapon from someone and shot Fife). In either scenario, Fife was unarmed when Rishor shot him. Unlike the defendant and the victim in Freeburg, Rishor and Fife were not in the midst of an on-going struggle when Rishor shot Fife. Rather, Fife and Rishor were some distance apart when Rishor raised and pointed the gun at Fife and then fired.

In fact, the Freeburg court recognized that an attack against an unarmed assailant would be an example of "[d]ifferent facts [that] might compel a different analysis." Freeburg, 105 Wn. App. at 505. The Freeburg court cited to the Corn, decision. In Corn, the defendant attacked and killed an unarmed assailant with a knife. The Corn court found similar jury instructions erroneous:

> [T]he instruction does refer to injury that "creates a probability of death," "causes significant serious permanent disfigurement," or a "significant permanent loss or impairment," none of which was established here. By giving [the great bodily harm] instruction, the trial court here left the impression that the evidence was insufficient to establish self-defense in that Ms. Corn was not faced with this type of injury.

Corn, 95 Wn. App. at 55. A later court summarized the Corn court's holding:

> In essence the [Corn] court held that where justifiable homicide is claimed in self-defense against an unarmed assailant, the objective definition of great bodily harm could cause a juror to reject self-defense without considering the defendant's right to act on appearances.

Freeburg, 105 Wn. App. at 507.

The narrow factual circumstances in Freeburg supported a finding that there was "no likelihood whatsoever that use of the great bodily harm language affected the outcome." Freeburg, 105 Wn. App. at 505. The situation here more closely parallels that in Rodriguez. Rishor's defense was that he shot Fife in self-defense after he was mauled by a group of men that included Fife. The jury instruction required the jury to find that Rishor was afraid of "death or at least permanent injury. And that is not the test." See Rodriguez, 121 Wn. App. at 187. As in Rodriguez, "these particular defense instructions struck at the heart of" Rishor's defense. See Rodriguez, 121 Wn. App. at 187. We conclude that the State has not met its burden of showing beyond a reasonable doubt that the erroneous instructions did not contribute to the jury's rejection of Rishor's self-defense theory. We reverse Rishor's conviction on count I and remand for a new trial.

III. The Lack of a Nexus Element in the Firearm Enhancement Jury Instructions Was Not Error

In State v. Schelin, 147 Wn.2d 562, 568, 55 P.3d 632 (2002), the Supreme Court required proof of a nexus between the defendant, the weapon, and the crime to qualify for a firearm enhancement. The Supreme Court has subsequently held that while it is permissible, jury instructions need not explicitly set forth the nexus requirement. State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213, (2005). Rather, the instruction is sufficient if its language "informs the jury that it must find a relationship between the defendant, the crime, and the deadly weapon." Willis, 153 Wn.2d at 374. The jury in Willis was instructed:

> [T]he State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crimes charged in count one . . . and/or count three. A pistol, revolver or any other firearm is a [deadly weapon] whether loaded or unloaded.

Willis, 153 Wn.2d at 370 (footnote omitted). The Willis jury was also instructed that "'armed' means '[a firearm was] readily available for offensive or defensive purposes.'" Willis, 153 Wn.2d at 371. The Willis court relied on both these jury instructions to conclude that

> [f]airly read, instruction 29 includes language requiring the jury to find a relationship between the defendant, the weapon, and the crime. Specifically, the defendant must have a deadly weapon, including a firearm, and the weapon must be readily available for offensive or defensive purposes at the time of the commission of the crime.

Willis, 153 Wn.2d at 374.

Rishor's jury was given Instruction 30, based on WPIC 2.10.01:

> For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Counts I, II and III.
>
> A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

However, unlike the Willis jury, Rishor's jury was not instructed on a definition of "armed." Thus the Willis decision is not dispositive.

Nevertheless, as this court has recently observed,

> [i]n a constructive possession case, the nexus test ensures that a defendant will not face a sentencing enhancement due to the incidental presence of a firearm. . . . When a defendant actually possesses a weapon during the commission of a crime, the protections of the nexus requirement become irrelevant.

State v. Easterlin, 126 Wn. App. 170, 173, 107 P.3d 773, review granted, 155 Wn.2d 1021 (2005). Thus, "the State need not prove a nexus between the defendant, the weapon, and the crime when the defendant actually possesses the firearm." Easterlin, 126 Wn. App. at 174. Here, Rishor admitted to actual possession of the firearm. Thus, the nexus requirement is not applicable.

Moreover, in State v. Howard, 127 Wn. App. 862, 878-79, 113 P.3d 511 (2005), review denied, 156 Wn.2d 1014 (2006), this court held that the omission of the nexus element is subject to harmless error analysis. Rishor admitted using a firearm to shoot Fife. Therefore, even if proof of nexus is required when the defendant actually (rather than merely constructively) possesses a firearm, the lack of a nexus element in Rishor's jury instruction is harmless error because Rishor's admission proves nexus beyond a reasonable doubt. See

Howard, 127 Wn. App. at 878-79 (applying constitutional harmless error test to determine if the record contains evidence proving nexus between firearm, crime, and defendant beyond a reasonable doubt).

We reverse and remand for a new trial on count I.

Appelwick, C.J.

WE CONCUR:

Ellington, J.

Azja, J.